Plainville Ready Mix Concrete Co. *and* Truckdrivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, AFL–CIO. Cases 9–CA–26777 and 9–CA–27320

November 27, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

This case involves the issue of whether the Respondent violated Section 8(a)(5) and (1) of the Act by implementing, after impasse, portions of its final offer regarding wages and medical benefits.[1]

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Plainville Ready Mix Concrete co., Batavia, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On June 30, 1992, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Deborah Jacobson, Esq., for the General Counsel.
Raymond D. Neusch, Esq. (Frost & Jacobs), of Cincinnati, Ohio, for the Respondent.
Bruce Pence, Esq. (Logothetis & Pence), of Dayton, Ohio, for the Union/Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This consolidated matter was heard on March 5, 1992, in Cincinnati, Ohio, on the General Counsel's consolidated complaint, dated April 5, 1990,[1] thereafter amended on April 13, 1990, and at the instant hearing. The complaint, in substance, alleges that Respondent, in violation of Section 8(a)(1) and (5) of the Act, following a lawful impasse, unlawfully implemented certain mandatory subjects of bargaining which implementations were changes in terms and conditions of employment not encompassed in Respondent's prior offers made to the Union during the negotiations and were implemented without having afforded the Union an opportunity to bargain on such changes. Respondent filed timely answer to the complaint wherein Respondent admitted certain allegations, denied others and denied the commission of unfair labor practices.

[1] The underlying unfair labor practice charges, filed by Truckdrivers, Chauffeurs and Helpers Local Union No. 100, I.B.T. (the Union), were served, respectively, on August 29, 1989 (Case 9–CA–26777) and March 1, 1990 (Case 9–CA–27320).

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, submit oral and written evidence, and to argue on the record. At the close of the hearing, the parties waived final argument and reserved the right to submit posthearing briefs. Posthearing briefs were submitted by Respondent and the General Counsel and have been duly considered in the light of the record as a whole.

Upon the entire record, including the briefs, and from my particular observation of the demeanor of the witnesses as they testified, I make the following

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY EMPLOYER

The complaint alleges, Respondent admits, and I find that at all material times Respondent, a corporation with a principal office and place of business in Batavia, Ohio, has been engaged in the manufacture, distribution, and sale of ready-mix concrete. During the 12-month period ending April 1990, in the course and conduct of its business operations, Respondent sold and shipped from its Batavia, Ohio facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Ohio. Respondent concedes, and I find, that it has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find, that at all material times Truckdrivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, AFL–CIO (the Union), has been and is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Following issuance of the April 5, 1990 consolidated complaint and Respondent's timely April 19, 1990 answer, the parties, in January 1991, entered into a stipulation of facts concerning the events surrounding the allegations of the complaint. As a result of the execution of the stipulation of facts, and a settlement agreement removing from the consolidated complaint certain allegations of 8(a)(1) conduct, the parties, on or about January 24, 1991, moved to submit the pleadings, the settlement of the 8(a)(1) allegations, and the stipulation of facts, without oral testimony or hearing before an administrative law judge, directly to the Board for findings of fact, conclusions of law, and issuance of a Board Decision and Order (G.C. Exh. 1(y)).

On March 14, 1991, the Board issued an order granting the parties' motion, approving the stipulation, and transferring the proceedings directly to the Board (G.C. Exh. 1(z)). The parties thereafter submitted timely briefs to the Board defining the issue presented as whether Respondent violated Section 8(a)(5) of the Act by unilaterally implementing, after impasse, only portions of its final offers.

On August 12, 1991, however, the Board issued an order in which it revoked its prior approval of the stipulation and directed a remand of the record to the Regional Director for further appropriate action, ''including direction of a hearing before an administrative law judge'' (G.C. Exh. 1(AA)). In the remand order, the Board stated:

> Specifically, the Board finds that further evidence reflecting Respondent's contemporaneous objective manifestations of intent in making its proposals for employee compensation and medical insurance coverage is necessary to determine whether the proposals on each bargaining subject were put forth as separate items or as a comprehensive, integrated whole.

Appended to the remand order is the Board's direction to ''*contrast Presto Casting Co.*, 262 NLRB 346 (1982), with *Emhart Industries*, 297 NLRB 215 (1989).'' Although Member Devany did not dissent from the Board's decision to revoke and remand, he did not pass on the relevance of evidence reflecting Respondent's intent in making its proposals.

Following the Board's remand order, the Acting Regional Director for Region 9, on December 4, 1991, issued an order rescheduling hearing to March 5, 1992, in Cincinnati, Ohio. In presided at that hearing on that date.

At the hearing, the parties agreed, notwithstanding the Board's prior revocation of acceptance of the stipulation, to continue their adherence to the stipulation of facts (Tr. 17–18; R. Br. 3). In addition, at the hearing, the General Counsel formally withdrew the 8(a)(1) allegations which had been previously the subject of a settlement (Tr. 15).

Respondent's answer to the consolidated complaint, contradicting the General Counsel's allegations concerning the appropriate unit, concedes that the appropriate unit is that which existed in the parties' expired collective-bargaining agreement (covering the period July 1, 1985, through January 31, 1988):

> All ready mixed drivers, yard employees, and mechanics, employed at the Employer's ready mixed concrete plants located [in Cincinnati, Ohio; Batavia, Ohio; and Wilder, Kentucky] but excluding all office employees, clerical employees, sales employees, guards, plant managers, assistant plant managers and supervisors as defined in the National Labor Relations Act.

Respondent further admits that for many years prior to 1985, the Union had been the exclusive collective-bargaining representative in the aforesaid appropriate unit and had been recognized as such by Respondent. Respondent further admits that the recognition of the Union was most recently embodied in their collective-bargaining agreement effective July 1, 1985, through January 31, 1988. I find that the appropriate unit is that which Respondent defines and concedes.

Lastly, Respondent's answer admits that on or about May 1, 1989, following good-faith impasse, Respondent made the following changes in the terms and conditions of employment of its unit employees: (a) eliminated the ''gain sharing'' and ''incentive pay'' plans; and (b) implemented a different medical insurance plan.

B. *The Stipulation of Facts*

The stipulation of facts, executed by the parties on and between January 3 and 9, 1991, to which, as above noted, the parties expressly adhered at the hearing, provides:

1. Truck Drivers, Chauffeurs & Helpers Local Union 100, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union) has represented a unit of ready-mix drivers, yard employees, and mechanics employed by Plainville Ready Mix Concrete Co. (the Employer) at the Employer's locations since the 1960s. Currently, the unit is composed of approximately 40 employees who work at the Employer's locations in Batavia, Ohio, and Wilder, Kentucky. The most recent collective-bargaining agreement between the parties expired by its terms on January 31, 1988. There has been no collective-bargaining agreement between the parties since that date.

2. Under the most recent agreement, class A mechanics with 2 or more years' service were paid $11.27 per hour effective June 1, 1987. Class A mechanics with fewer than 2 year's service were paid $11 per hour effective June 1, 1987. All other employees with 2 or more years' service were paid $10.27 per hour effective June 1, 1987, and all other employees with fewer than 2 years' service were paid $10 per hour effective June 1, 1987.

3. Prior to the expiration date of the agreement, the parties met on January 12, 19, 22, and 25, 1988, to negotiate a new agreement. During these negotiations, the Employer proposed a reduction in the hourly wage rate for all classifications. The Employer also proposed gain sharing and incentive pay plans which were not terms of the existing collective-bargaining agreement. The proposed gain sharing and incentive plans were offered in conjunction with the proposed reduction in the hourly wage rate for all classifications.

4. On February 10, 1988, in its proposal 5, the Employer made its final offer to the Union. That offer provided for an hourly wage rate of $9.23 in each year of a 3-year contract for all employees with fewer than 2 years' service and an hourly wage rate of $9.50 per hour in each year of a 3-year contract for employees, except for class ''A'' mechanics, with 2 years or more of service. The Employer's final offer also included the gain sharing and incentive pay plans. The Union rejected the Employer's final offer and an impasse in bargaining was reached at the meeting on February 10, 1988. On March 7, 1988, the Employer implemented its final offer.

5. The parties met again on April 22 and May 25, 1988. During the April 22, 1988 meeting, in its proposal 6, the Employer proposed improvement in its medical insurance plan and the institution of a prescription drug card in addition to the items offered in its proposal 5. During the May 25, 1988 meeting, in its proposal 7, the Employer proposed an improvement in holiday pay, in addition to the items offered in its proposal 6. All of these proposals were rejected by the Union.

6. On April 21, 1989, the parties met again for further negotiation. At that meeting, the Employer offered its proposal 8, which included an increase in the hourly wage rate implemented on March 7, 1988. The higher wage rate proposal was offered by the Employer in conjunction with the proposal to eliminate the gain sharing and incentive pay plans implemented on March 7, 1988. Under this proposal, class A mechanics with more than 2 years' service would earn an

hourly rate of $10.50 for the period from May 1, 1989, through January 31, 1992. All other employees with more than 2 years of service would earn $9.75 per hour effective May 1, 1989, $10 per hour effective September 1, 1989, and $10.25 per hour effective January 1, 1990. Class A mechanics with fewer than 2 years' service would earn $10.23 per hour during the terms of the agreement and all other employees with fewer than 2 years' service would earn $9.48 per hour effective May 1, 1989, $9.73 per hour effective September 1, 1989 and $9.98 per our effective January 1, 1990. The Employer also proposed changes to the existing health plan and the addition of a prescription drug card. The new agreement would expire on January 31, 1992. The Union rejected the Employer's proposal 8 and impasse was reached at the meeting on April 21, 1989. The Union indicated to the Employer at the meeting that it would not submit the proposal to the membership for a vote. The Union requested that the gain sharing be paid to the employees on a pro rata basis for 1989 and the Employer agreed to this request and has made such payments.

7. On May 1, 1989, the Employer implemented portions of the offer made at the April 21, 1989 meeting. Hourly wage rates remained as implemented by the Employer on March 7, 1988. The Employer did not pay the May 1 and September 1, 1989, and January 1, 1990 pay raises as proposed in its offer on April 21, 1989. The Employer eliminated the gain-sharing and incentive pay plans as proposed in its offer on April 21, 1989. The agreement to pay the gain sharing on a pro rata basis or 1989 was implemented. The Employer implemented certain of the changes in the health plan it had proposed to the Union on April 21, 1989, but did not implement other provisions of the plan, including the prescription drug card, voluntary vision care plan and emergency care plan as proposed at the meeting.

8. (The parties attached to the stipulation the following documents which they believed to be relevant to the disposition of this matter):

a. The collective-bargaining agreement between the Employer and the Union, effective dates June 1, 1985, to January 31, 1988.

(b) Employer proposal 5 dated February 10, 1988, with attachments on Gain Sharing, Incentive Pay, and Retirement Savings Plan.

(c) Employer's letter to employees dated March 7, 1988, titled *Important Changes in Working Conditions.*

(d) Employer proposals 6, dated April 22, 1988, with attachment on *Changes to New Health Plan.*

(e) Employer proposal 7, dated May 25, 1988, with attachment on *Holidays.*

(f) Employer proposal 8, dated April 21, 1989, with attachments on *Health Insurance.*

(g) Employer letter to employees dated May 1, 1989, titled *Important Changes in Working Conditions.*

C. *Testimony at the Hearing*

Although most of the testimony taken at the hearing was merely repetitive of that which appeared in the above stipulation, there is no dispute that the central issue regarding wages and Respondent's implementations related to unit employees (particularly drivers) with more than 2 years of service. Little, if any, testimony was directed towards mechanics (whether class ''A'' or class ''B'') or employees with less than 2 years of service with Respondent.

Thus on five occasions prior to the January 31, 1988 expiration of the existing 3-year collective-bargaining agreement, the parties negotiated for a new agreement. On these occasions and thereafter, Respondent made no secret of its desire to reduce unit employees' fixed wages in order to compete successfully in the market. As early as the January 22, 1988 meeting, however, when Respondent proposed a reduction in the hourly rate of drivers (with 2 years' service) to $9 per hour in the first year of a new contract, it offered to include, for the first time, ''gain sharing'' and ''incentive pay'' plans as part of the remuneration delivered to unit employees. Respondent told the Union that these plans would make it possible for employees to recoup some of the wage reduction (R. Br. 3). The Union's bargainer (General Counsel's witness at the hearing), Squire T. Griffin Jr., credibly testified (Tr. 42) that Respondent's bargainer (Attorney James Lawrence) used the expression ''total package deal'' in describing the inclusion of ''gain sharing'' and ''incentive pay'' along with wages. Respondent's January 22, 1988 proposal on ''wages'' (G.C. Exh. 2, p. 2) defines the inclusion of gain sharing and incentive pay as an amendment to the existing collective-bargaining agreement's section on ''wages'' (art. 22).

Gain Sharing is defined by Respondent (G.C. Exh. 2, p. 2) as a unitwide bonus system designed to reward eligible participants for improved performance which exceeds established standards. The fund out of which gain sharing dividends (to full-time employees) would be paid would flow from the Employer's determination of the net savings and losses from operations concerning (a) liability insurance, (b) fleet maintenance, (c) plant maintenance, and (d) driver efficiency. Any net savings would be shared between Respondent and the employees annually on a 50-percent basis.

Incentive Pay is defined as a plan based on ''yards of concrete'' delivered compared to a standard determined by Respondent. The employees who meet the standard would receive a 40-cent per hour increase in wages; and those employees who function 5, 10, or 15 percent above the standard would receive hourly wage increases of 50, 60, and 75 cents per hour on a weekly basis.

Respondent, as above noted, told the Union during 1988 bargaining (1) that the gain sharing and incentive plans were methods by which the Respondent's proposed decrease in wages might at least, in part, be made up for if economic conditions permitted (Tr. 124–125); and (2) attempted to demonstrate to the Union that although the employees would be working at a reduced fixed hourly rate, the total economic proposal, including gain sharing, and incentive pay, would ''equal or exceed'' what the employees were then earning at the fixed rate of $10.27 per hour (Tr. 42–43). In one of the collective-bargaining sessions (Attorney Lawrence placed it as the session of January 22, 1988 (Tr. 121)), Respondent stated that the employees who were then earning $10.27 an hour might earn as much as $10.67 or $10.70 per hour (Tr. 47). The Union said that it wanted a fixed wage rate instead of the gain sharing and incentive plans especially in view of a possible recession when building activity might slacken (Tr. 57). In that situation, the Union realized that the employees would be working for no more than the fixed rate of $9.50 per hour (Tr. 57).

At the same time, Respondent proposed a new, self-insured health insurance plan. The Union continually proposed a return to the Teamsters health insurance plan (Tr. 71).

By the bargaining session of February 10, 1988, the Respondent was offering a wage rate of $9.50 per hour for the period 1988 through 1990, the self-insured health insurance plan the gain sharing plan, the incentive pay plan and a retirement savings plan (Jt. Exh. 2). The Union rejected this final offer and, on March 7, 1988, after impasse, Respondent implemented the final offer and so notified the employees (Jt. Exh. 3).

In bargaining on April 22, 1988, the employer offered to make changes in the existing self-insured health insurance plan including broadening coverage, a drug card to be used by unit employees and elimination of the deductible for hospital admissions. Notwithstanding an offer of a bonus of a week's pay for the union to accept the otherwise existing terms, the union rejected this April 22 offer (Jt. Exh. 4).

On May 25, Respondent further sweetened its offer (maintaining the $9.50 per hour fixed wage rate together with gain sharing incentive pay, retirement plan, and a signing bonus) by offering pay for the six holidays which the Company observed and previously did not pay for (compare: Jt. Exh. 2, art. 21, with Jt. Exh. 5, p. 2). The Union nevertheless rejected the May 25, 1988 offer.

Finally, on April 21, 1989, thus about a year after the last prior negotiation, the parties met for further negotiations. At that session, as the stipulation observes, Respondent offered its proposal 8 which included an increase in the existing $9.50 hourly wage rate. The Union had repeatedly rejected Respondent's wage offer containing the incentive plan and the gain-sharing plan and insisted on a fixed rate. Respondent's new, higher fixed wage rate proposal, according to the union bargainer, was offered by Respondent ''in lieu of'' the gain sharing plan and the profit sharing (Tr. 62). Such testimony is not inconsistent with the Stipulation which notes that the ''higher wage rate proposal was offered by the Employer in conjunction with the proposal to eliminate that gain sharing incentive pay plan implemented on March 17, 1988 (stipulation, par. 6). In substance, the new, higher fixed wage rate proposal would provide for employees with in excess of 2 years of service a series of 25-cent-an-hour increases with a starting rate of $9.75 per hour (effective May 1, 1989); $10 per hour (effective September 1, 1989); and $10.25 per hour (effective January 1, 1990). The face of company proposal 8, dated April 21, 1989 (Jt. Exh. 6) shows, in addition to the 25-cent-an-hour increase to $9.75 per hour, the elimination of both the gain sharing plan and the incentive pay plan, effective April 30, 1989. Respondent also proposed changes in the health plan, some of which were improvements in benefits and some of which were disadvantageous to the employees. Among the beneficial items in the proposed health plan changes, were a vision care plan, a prescription card, and emergency care benefits (Jt. Exh. 6, pp. 2–3).

During the April 21, 1989 bargaining, Respondent again offered the paid holiday element which had been rejected in the May 25, 1988 negotiations. The Union continued to insist on the reestablishment of the Teamsters health plan but Respondent rejected that proposal and insisted on continuing a self-administered plan.

At no time during this bargaining session did Respondent propose to eliminate gain-sharing plan and incentive pay plan without proposing the increase in fixed wages (Tr. 62). The Union inquired, during this session, whether Respondent would pay the gain sharing on a prorata basis through April 30, 1989, regardless whether the employees voted to accept this Respondent final offer. Respondent agreed to this request. Thereafter, the Union rejected Respondent's final offer and reached impasse on April 21, 1989.

On April 24, 1989, Respondent distributed to its employees a memorandum informing them of the terms of its April 21 final offer. It noted that the Union's ''primary concerns'' were ''a fixed wage increase in lieu of gain sharing and incentive pay, holiday pay and a better health plan'' (G.C. Exh. 3). The memorandum also notes that Respondent offered three, 25-cent-per-hour wage increases commencing May 1 and September 2, 1989, and January 1, 1990; the dropping of gain sharing and incentive paid plans; the offer to pay for six holidays; and improvements in the health plan including a prescription drug card with small deductibles for each prescription (G.C. Exh. 3).

Respondent then admits (R. Br. p. 4–5) that on May 1, 1989:

> Respondent implemented . . . those parts of its final offer that included the elimination of the gain sharing and incentive pay plans and certain of the disadvantageous changes in the health plan. Respondent did not implement the wage increase it had proposed nor did it implement certain improvements to the health plan that it had proposed including a prescription drug card, voluntary vision care and emergency care.

As the General Counsel observes (Br. p. 4) the actual implementation was the retention of the existing base hourly rate of $9.50 per hour (the wage rate unilaterally implemented in 1988 which had been accompanied by the gain sharing and incentive pay plans) but elimination of both gain sharing and incentive pay without granting the wage increases it had proposed ''in lieu of'' those plans.

With respect to the implemented health care plan, as the General Counsel observes, Respondent implemented portions of its medical insurance package which represented additional cost to employees or limitations of benefits. Respondent refers to these as ''disadvantageous changes in the health plan'' (R. Br. pp. 4–5). These included increases in deductibles and copayments, and employee contribution of $10 a week for single coverage and limitations on the drug and alcohol treatment and psychological treatment benefits (G.C. Br. p. 4). Respondent did not implement those portions of its health plan representing benefits to employees: the prescription drug card, a voluntary vision care plan, and an emergency care plan.

Discussion and Conclusions

The Board's remand order is based on the Board's view that it required ''further evidence'' reflecting Respondent's contemporaneous objective manifestations of intent in making its proposals for employee compensation and medical insurance coverage. The face of the remand order further demonstrates that the purpose of any such ''further evidence'' is to enable the Board to ''determine whether the proposals on each bargaining subject were put forth as separate items or as a comprehensive, integrated whole.'' If the latter, then a

fragmented implementation would be inconsistent with its prior offers to the Union, thus not affording an opportunity to bargain on the changes. If the former, then the implementation would be ''reasonably comprehended'' within the preimpasse proposals. See generally *NLRB v. Katz*, 369 U.S. 736 (1962); compare: *Winn-Dixie Stores v. NLRB*, 567 F.2d 1343, 1349–1350 (5th Cir. 1978), with *Emhart Industries v. NLRB*, 907 F.2d 372 (2d Cir. 1990).

D. *Respondent's May 1, 1989 Wage Implementation Violated Section 8(a)(5) of the Act*

Respondent cites *Hi-Way Billboards*, 206 NLRB 22, 23 (1973), for the following unassailable proposition (R. Br. p. 13):

> Once a genuine impasse is reached, the parties can concurrently exert economic pressure on each other, the union can call for a strike, the employer can engage in a lockout, make unilateral changes in working conditions if they are consistent with the offers the Union has rejected, or hire replacements to counter the loss of striking employees [emphasis supplied].

Respondent further relies on *Emhart Industries v. NLRB*, 907 F.2d 372 (2d Cir. 1990). The Second Circuit in that case denied enforcement of the Board's underlying position in *Emhart Industries*, 297 NLRB 215 (1989).[2]

In *Emhart Industries v. NLRB*, supra, the court (and the Board) were concerned with an employer's offer of a comprehensive reinstatement procedure for returning striking employees. Among the elements, if not the principal element, of this procedure, was a provision relating to reinstatement by plantwide seniority. In that case, the employer's proposal was rejected by the union and the employer unilaterally implemented only so much of the offer as related to plantwide seniority. Both the court and the Board found that the employer and the union had bargained to good-faith impasse prior to unilateral implementation. The Board found, according to the court, that reinstatement by plantwide seniority reflected only a relatively small part of the comprehensive strike settlemment plan proposed by the employer prior to impasse and differed significantly from both its own proposal and its ultimate agreement with the Union. For these reasons, the Board concluded that the reinstatement procedure was not reasonably comprehended within the employer's preimpasse proposals, *Emhart Industries v. NLRB*, supra.

Not using the *Hi-Way Billboard*, supra, formulation that the unilaterally implemented changes are lawful ''if they are consistent with the offers the union has rejected,'' the court invokes the *NLRB v. Katz*, supra, standard: that the proposal must be ''reasonably comprehended'' within the earlier offers to the union.[3] The court, finding that Emhart's plantwide seniority reinstatement procedure was ''an explicit part'' of its preimpasse proposal, rejected the Board's finding that it was only a ''relatively small part of a comprehensive system'' and, refusing to enforce the Board's finding, held that plantwide seniority was ''reasonably comprehended'' within the rejected offer and not unlawful. The court of appeals in *Emhart Industries v. NLRB*, supra, further states:

> This case thus differs significantly from cases in which an employer unlawfully institutes a change that was not included in its pre-impasse proposal, see *Peerless Roofing Co. v. NLRB*, 641 F.2d 734 (9th Cir. 1981) or imposes a wage increase higher or lower than one previously offered. See *Katz*, 369 U.S. at 745 . . .; *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949); *Winn-Dixie Stores, Inc. v. NLRB*, 567 F.2d 1343, 1349–50 (5th Cir. 1978), modified on other grounds, 575 F.2d 1107, cert. denied, 439 U.S. 985 (1978). Instead, the case bears similarity to one in which an employer lawfully implemented the wage portions but not the benefit portions of its final pre-impasse offer. ''In view of the nature of an impasse,'' the Board held in that case, ''there is no requirement that an employer who implements some of its proposals, must implement his entire proposal.'' *Presto Casting Co.*, 262 NLRB 346 (1982), enforced in part and denied in part on other grounds, 708 F.2d 495 (9th Cir. 1983); cert. denied 464 U.S. 994 . . . .

Thus in *Emhart Industries v. NLRB*, supra, the court cites *Winn-Dixie Stores v. NLRB*, 567 F.2d 1343 (5th Cir. 1978), as an example of unlawful unilateral implementation; implemented elements not included in the preimpasse proposal. In *Winn-Dixie Stores*, supra, the unilaterally implemented wages were both higher and lower than the offer which lead to impasse. Thus the implemented wage increases, according to that court, *Winn-Dixie Stores v. NLRB*, supra, were thus ''significantly different'' from those proposed to and rejected by the collective-bargaining representative. In *Winn-Dixie Stores*, the employer went to impasse with the Union on a proposed wage increase of 5.5 percent. It implemented, however, wage increases of 4.11 percent to 6.23 percent. The Board, as the court noted, found that the ''increases granted by the company differed significantly from the 5.5% increase the company had proposed to the union in their negotiating sessions,'' *Winn-Dixie Stores v. NLRB*, supra. Affirming the Board, the court held that ''implementing changes significantly different from those proposed to and rejected by [the union] is tantamount to implementing changes without notifying the union of the proposed changes. Cf. *NLRB v. Katz*, 369 U.S. 736. ''[With] respect to the changes actually implemented, the union had neither notice nor an opportunity to respond.''

In the instant case, the Union demanded, and Respondent offered, a ''fixed wage increase in lieu of gain sharing and incentive pay'' (G.C. Exh. 3). The two supplementary plans, on this record, were integral to the existing ''wages'' of unit

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[2] I agree with the General Counsel that I am, of course, bound by the Board's position regardless of lack of enforcement in the circuit until such time as the Board may acquiesce in the circuit's position. *Iowa Beef Packers*, 144 NLRB 615 (1963).

[3] The Supreme Court's underlying formulation was originally that there is no unfair labor practice where the unilateral change is the same proposal as preimpasse but has been left unaccepted or rejected, *NLRB v. Crompton-Highland Mills*, 337 U.S. 217, 224 (1949). The ''reasonably comprehended'' standard derives form the later *NLRB v. Katz*, 369 U.S. 736 (1962). There is no question, and it is not in dispute, that in postimpasse implementation, an employer need not implement all of its preimpasse proposals. *Bi-Rite Foods*, 147 NLRB 59 (1964), but the question of what may be implemented persists. See *NLRB v. McClatchy Newspapers*, 140 LRRM 2249 (D.C. Cir. 1992).

employees. In substance, Respondent *offered* $9.75 per hour for the first 4 months, $10 per hour starting September 1, 1989, and $10.25 per hour commencing January 1, 1990, together with the elimination of gain-sharing and the incentive pay plans commencing with the new contract. Respondent *implemented* at the existing, retained hourly rate for drivers at $9.50 per hour and eliminated the gain sharing and incentive pay plans. The plans, on this record, were instituted as a wage device to help escape the reduced fixed wage rate in 1988. The elimination of these plans in 1989 was, I find, according to the intent of the parties, entirely conditional upon the Union's acceptance of a fixed rate. Respondent's May 1989 implemented wage level ($9.50 per hour) was never offered to, considered by, or even rejected by the Union. The implemented rate of $9.50 an hour together with the elimination of the plans formed no part of any Respondent collective-bargaining offer and therefore played no part in any union consideration or rejection and played no part in the impasse. In substance, therefore, rather than coming within the line of cases, including *Presto Casting Co*., 262 NLRB 346 (1982), i.e., the lawful implementation of part but not all of the preimpasse offer, this case comes within the forbidden area of *Peerless Roofing Co. v. NLRB*, 641 F.2d 734 (9th Cir. 1981), *Winn-Dixie Stores v. NLRB*, 567 F.2d 1343, and ultimately *NLRB v. Katz*, 369 U.S. 736 because Respondent's offer herein was not ''reasonably comprehended within its pre-impasse proposals to the Union.'' Precisely as in *Winn-Dixie*, supra at 2870, with respect to the wage rate actually implemented, the union ''had neither notice nor an opportunity to respond.''

The conclusions in *Emhart Industries v. NLRB*, supra, and *Presto Casting Co*., supra, I find, have no application to the instant facts. In both *Emhart Industries* and *Presto Casting*, the implemented elements were recognizable pieces in the impasse offers, unlike *NLRB v. Winn-Dixie Stores* where the implemented wage increases were both higher and lower that the impasse offer. The *Winn-Dixie* increases were ''different'' from the impasse offer. In *Emhart Industries v. NLRB*, the court differed from the Board over whether the plantwide seniority system, characterized by the Board as a relatively ''small part'' of the impasse offer, was not included in the employer's implemented terms. Similarly, in *Presto Casting Co*., supra, the actual, implemented wages were part of the preimpasse money package proposal notwithstanding that implementation did not include the pension plan.

In the instant case, however, a wage rate of $9.50 per hour never played any part in Respondent's offer, the Union's consideration or rejection, or the impasse. In short, the postimpasse $9.50 per hour implementation, notwithstanding Respondent's bargaining notification that the incentive plan and the gain-sharing plan would be eliminated, was a wage element not identifiable in its preimpasse proposals and thus ''*not* included in its pre-impasse proposals.'' as specified in *Emhart Industries v. NLRB*, supra; see *NLRB v. Katz*, supra; *Winn-Dixie Stores v. NLRB*, supra; and *Peerless Roofing Co. v. NLRB*, supra. In particular, Respondent's offer of a ''fixed increase in lieu of gain sharing and incentive pay'' (G.C. Exh. 3) never revealed $9.50 per hour as the ''fixed wage increase.'' The implemented $9.50 fixed wage rate without the plans was as ''different'' from the implemented offer what the parties went to impasse on as that in *NLRB v. Winn-Dixie*, supra. It was an implementation ''higher or lower than one previously offered,'' *Emhart Industries v. NLRB*, supra.

Furthermore, I necessarily agree with the General Counsel's argument that Respondent's $9.50 per hour implemented wage level increase is not included in the preimpasse proposal notwithstanding that $9.50 per hour is a mathematically recognizable part of $9.75 per hour which was Respondent's fixed wage rate offer. To urge that the mathematical inclusion of the implemented offer ($9.50 per hour) is within the rejected bargaining offer ($9.75 per hour) is sophistical. Any wage offer of a lesser amount of course is included within the greater offer; but this is metaphysics not collective bargaining. It seems moreover, that the *Hi-Way Billboards* formulation for lawful unilateral implementations (''if they are consistent with the offer that the Union has rejected''), 206 NLRB 22, 23, is no longer scrupulously followed and may well have been an extension of the *Katz* ''reasonably comprehended'' standard. Nevertheless, there must remain some substantial meeting of the minds as to what the employer's offer is, and what the Union's contemplation and rejection are, in order that the concept of impasse retain an intellegible position in the collective-bargaining process, whether or not its bright-line has been obscured by the ''reasonably comprehended'' rule (compared to an ''offered and rejected'' rule). Since a fixed rate of $9.50 per hour was never offered by Respondent nor reasonably considered by the Union, *Winn-Dixie Stores v. NLRB*, supra, it was not ''reasonably comprehended'' in Respondent's preimpasse offers, and its unilateral implementation, certainly without the two supplementary plans, violated Section 8(a)(5) and (1) of the Act as alleged.

E. *The Evidence at the Hearing*

At the hearing, the evidence, like the stipulation of facts, showed that the Respondent's intent was to offer an enhanced fixed wage rate ($9.75 per hour, progressively rising to $10.25 per hour) and to eliminate both gain sharing and incentive pay plans. This was in response to the Union's historic rejection of Respondent's contract offers and Respondent's effort to secure the benefit of a collective-bargaining agreement. The credited testimony of the General Counsel's witness, the union bargainer, was that during the bargaining, Respondent earlier characterized the two supplementary plans as part of the total wage package (Tr. 42) and proposed the 1989 increased hourly rate ($9.75/hour) ''in lieu of'' the gain sharing and incentive pay plans (Tr. 62). As noted, this was entirely consistent with Respondent's vice president's own description of the function of the increased pay offer (a response to the union's concern for a ''fixed wage increase in lieu of [the plans].'' (G.C. Exh. 3). Again, the $9.50 per hour implemented wage rate was never mentioned in collective bargaining by Respondent's bargainer. Unlike the employer's plantwide seniority proposal in *Emhart Industries*, supra, it was not even a part of a Respondent wage offer, the Union's rejection, or the impasse. For the reasons stated above, I find that the implemented wage rate of $9.50 per hour was therefore ''different than'' and not included in its preimpasse proposals. *Peerless Roofing Co. v. NLRB*, 641 F.2d 734 (9th Cir.), *Winn-Dixie Stores v. NLRB*, 567 F.2d 1343, 1349–1350 (5th Cir.); modified on other grounds 575 F.2d 1107, cert.

denied 439 U.S. 985 (1978); *Emhart Industries v. NLRB*, 907 F.2d 372 (2d Cir.)

Respondent argues that a finding of a violation of Section 8(a)(5) of the Act would interfere with the historic basis of bargaining in terms of the employer's aims. Respondent asserts that its ability to implement less than the final offer, if found unlawful:

> would deprive employers of a valuable and widely accepted economic strategy to obtain an agreement . . . [and] would mean that, in order to implement certain changes they needed, employers would be required to grant the benefits they proposed in an unsuccessful attempt to get a complete agreement without getting complete agreement that those proposed benefits were intended to obtain [R. Br. p. 13].

It is unnecessary to reach this argument. As noted, Respondent's implemented wage level ($9.50 per hour) was never part of any offer it made to the Union in 1989, was never rejected by the Union and was never an element in the impasse. Respondent must await for another day with other facts to urge this broad-based policy argument to the Board. Unlike *Emhart Industries v. NLRB*, supra, on which Respondent relies, Respondent's implemented wage rate was not ''an explicit part of its proposal.'' (R. Br. p. 9.) Thus Respondent may not now urge the above alleged interference with free collective-bargaining strategy.

Respondent also argues that the Union recognized that the gain sharing and incentive plans were going to be eliminated whatever else happened at the bargaining table; and the Union's request for a pro rata distribution of earnings under these plans which were to be discontinued as of April 30, 1989, constituted evidence that the plans were ''separate and apart from other elements in the [wage] proposal.'' (R. Br. p. 11). In fact, however, the elimination of the plans as part of the compensation package was entirely conditional upon Respondent's proposed increase in the fixed wages. Indeed, evidence adduced at the hearing demonstrated that this was Respondent's understanding (G.C. Exh. 3). The preimpasse contemplation of the parties was that the two plans, already integrated into ''wages'' were to be foresworn in exchange for an increase in fixed wages. Thus distribution on a pro rata basis, as I understand the facts, demonstrates a method and a time of payment rather than an acknowledgement that the Union would accept the elimination of these plans (and the remuneration flowing from them) even if the wage rate was to be maintained at the existing wage rate ($9.50 per hour) or perhaps reduced even further. Moreover, even assuming that the Union's request for pro rata distribution of gain sharing constituted some evidence that gain sharing was ''separate and apart'' from other elements in the wage proposal, I would nevertheless find that it was conditioned on the assumption that the fixed wage would be increased ''in lieu of'' the plans, as Respondent's vice president correctly characterized the Union's objective (G.C. Exh. 3). Hence, without a wage increase of some character, the implementation of the existing fixed rate of $9.50 per hour without the plans would run counter to the manifested bargaining positions of both parties to the impasse.

E. *The Health Plan Implemented May 1, 1989*

The expired collective-bargaining agreement (1988) included the ''Choice Care'' health plan for unit employees. That health plan consisted of hospitalization and doctor bill coverage, drug prescriptions and life insurance. Employees with family coverage paid, under the contract, $36.45 per month and Respondent paid all single employee premiums. Employees however paid deductibles under the expired contract.

By the time of Respondent's April 21, 1989 offer (Jt. Exh. 6), married employees would pay $391.71 per month for family coverage as opposed to $165 per month under the ''Choice Care'' plan. Proposed deductibles rose from $200 to $600 per family before the insurance coverage commenced. Under the expired plan, as noted, there were provisions for payment of drug prescriptions and eyeglasses.

The Union continually proposed reinstitution of the Teamsters' health plan which had been in effect under prior contracts; Respondent continually rejected that proposition. According to the union bargainer, in the last bargaining session, April 21, 1989, Respondent, in reviewing its health plan provision (Jt. Exh. 6) told the Union that this was going to be the plan; that this was what they were going to get. Respondent's attorney, Lawrence, denied this testimony and, instead, testified that he told the Union bargainers that the Company was willing to make some changes in the health plan from its existing proposal (Jt. Exh. 6 p. 2) (compare Tr. 169 with Tr. 71–72). In any event, the union bargainer (Griffin) testified that with regard to the April 21, 1989 bargaining on the health plan, the 10 items appearing on the Respondent's offer (Jt. Exh. 6) were each read by the parties and compared in cost to the Teamsters plan; but there was no discussion of the items. Rather they were just read by Respondent's lawyer. Upon the Union's objection to some of the items, the objections were discussed and then dismissed by the Respondent's bargainer who would not agree with the Union's objections (Tr. 101). The Union admitted that prior to the Company's April 21, 1989 offer, the employees had no drug prescription card (Tr. 102–103).

Following impasse resulting from the Union's objection to the wages and health plan in Respondent's April 21, 1989 offer, Respondent, on May 1, 1989, implemented only a certain number of the 10 items appearing on its offer. In particular, it implemented the increase in deductibles (for individuals $200 per calendar year; for family, $600 per calendar year); it now required single employees to contribute $10 per week; it increased the cost of family plan coverage to $19 per week plus 50 percent of any increase in premium over the current premium of $391.71 per month. It did not implement the beneficial elements in its offer which included the prescription drug card, the voluntary vision care plan and an emergency care plan.

The General Counsel argues that the April 21, 1989 health plan proposal was ''a package'': that Respondent established the cost and told the employees, without permitting actual dissent, that that would be the coverage they would receive. The evidence showed, however, that regardless of whether Respondent presented the health plan on a take it or leave it basis, as the union bargainer testified, there was at least discussion of each element of the plan that the Union raised. The General Counsel urges that, as in the underlying Board position in *Emhart Industries*, 297 NLRB 215, Respondent's

health plan proposal was part of a ''comprehensive system'' or part of ''an integrated whole.'' Respondent argues that since each element of the health plan was discussed consistent with the issues raised by the Union, the plan could hardly be characterized as entirely integrated and one without ''seams.'' Similarly, Respondent argues (Br. 12) that merely because of the negotiations of April 21, 1989, failed to produce any change in the health plan proposed by Respondent, that fact alone does not establish that all the elements of the plan were inextricably linked. Respondent argues that there were no changes only because the Union offered no alternative to a health plan other than the reinstitution of the Teamsters plan to which Respondent was consistently opposed.

Finally, the General Counsel observes that Respondent implemented only those elements unfavorable to the employees including deductibles, limitations on the drug and alcohol treatment and psychological treatment benefits. It did not implement those portions of the health plan which represented benefits to employees: the prescription drug card, the voluntary vision care plan and the emergency care plan. Respondent concedes that it did not implement certain improvements in the health plan that it had proposed including the prescription drug card, the voluntary vision care and the emergency care elements (R. Br. pp. 4–5; stipulation of facts, pars. 6–7). Indeed, Respondent concedes (Br. pp 4, 5) that it implemented only those parts of its final health plan offer which were disadvantageous changes and did not implement the improvements that it had proposed: the prescription drug card, voluntary vision care and emergency care.

Discussion and Conclusions

The General Counsel argues that the health plan was entirely integrated and was part of a single health plan package, the parts of which could not be separated. Thus the General Counsel argues that under the instant facts, as in *Emhart Industries*, 297 NLRB 215, Respondent could not implement merely elements of its integrated health plan, all part of a comprehensive health plan system. The General Counsel further argues, a fortiori, it could not lawfully implement only those sections which were not beneficial to the employees. In particular, the General Counsel argues, citing *Seattle-First National Bank*, 241 NLRB 753 (1979), that the distinct elements in the instant health plan, unlike those in situations where each unilaterally implemented element ''stands on their own,'' cannot stand on their own. In the instant case, each element of the drug plan is interrelated and a part of comprehensive whole.

Respondent argues that each of the elements in the health plan was separately discussed and that the Respondent rejected the Union's positions only because it presented no alternatives to that which Respondent offered and particularly stuck only to the reinstitution of the Teamsters plan. I do not credit the General Counsel's witness insofar as he testified that Respondent offered the health plan on a ''take it or leave it'' basis. That may have been a reasonable conclusion but it was not literally offered on that basis.

It seems to me vain and unprofitable to argue whether the separate elements of Respondent's April 21, 1989 health plan are so interrelated as to form part of a single integrated whole the implementation of only parts of which, whether beneficial or detrimental to the employees, would be unlawful under the Board and court precedents.

The evidence adduced at the hearing did not show an intentional integration of the elements of the plan. The elements were severably spoken of. Whether notation is the same as discussion is a matter of degree. Respondent did not lay the plan on the table and say take it or leave it. Unlike its wage offer, its health plan elements are individually identifiable in the preimpasse offer. The evidence adduced at the hearing concerning the health plan as might be expected, was not reliable in determining the parties' ''contemporaneous manifestations of intent'' under the Board's remand. I would find, in any event, that the separate elements of the health plan are no more nor less integrated than those parts of the strike settlement plan before the Board and the court of appeals in *Emhart Industries*, 907 F.2d 327. It is clearly and reasonably arguable that any part of Respondent's proffered medical insurance plan was ''an explicit part'' of the plan as was the plantwide seniority element in *Emhart Industries v. NLRB*, supra. I will not attempt to distinguish the facts in Emhart Industries from the instant facts either as to which is more integrated than the other or whether, like plantwide seniority, it was central in the offer. An overall strike settlement plan is no different than an overall health insurance plan. Nothing in the testimony at the hearing clarified the remanded issue; the testimony of both witnesses was self-serving, geared to conclusions on what their intent was in making and rejecting the health plan. The hearing shed no discernable light on the parties' objective contemporaneous manifestation of intent on the integration of the proposal.

In view of my findings that the cases present a legally indistinguishable problem, I must necessarily find, as an agent of the Board, consistent with the Board's position, that the plan was presented as a health insurance plan; that the elements of the plan do bear an economic and functional relationship to each other; and that to implement only parts of the plan, a fortiori those parts of the plan principally detrimental to the employees,[4] is an unlawful implementation within the meaning of *NLRB v. Katz*, supra, and *Winn-Dixie v. NLRB*, supra. The fact that the court of appeals in *Emhart Industries v. NLRB*, supra, might well take a view inconsistent with the above finding, does not affect my obligation as an agent of the Board to follow the Board rule in *Emhart Industries*, 297 NLRB 215. I therefore conclude, consistent to the General Counsel's argument and Board precedent, that the implementation of only portions of the health plan violates Section 8(a)(5) and (1) of the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit of Respondent's employees constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

[4] The complaint fails to allege that Respondent's implementation of the disadvantageous parties of the plan were retaliatory, punitive, or were in any way unlawfully motivated.

> All ready mixed drivers, yard employees, and mechanics, employed at Respondent's ready mix concrete plants located at Cincinnati, Ohio, Batavia, Ohio,, and Wilder, Kentucky, but excluding all office employees, clerical employees, sales employees, guards, plant managers, assistant plant managers and supervisors as defined in the National Labor Relations Act.

4. At all material times since 1985, the Union has been and is the designated exclusive collective-bargaining representative of the employees in the above unit within the meaning of Section 9(a) of the Act and since such date has been so recognized by Respondent.

5. Respondent, on or about May 1, 1989, in violation of Section 8(a)(5) and (1) of the Act, implemented provisions of a wage proposal and a health plan which were not included in, and are inconsistent with, its preimpasse proposals to the Union which the Union rejected.

6. Respondent has not violated the National Labor Relations Act and any other fashion.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, it is recommended that Respondent be ordered to cease and desist therefrom and take the following affirmative action which is designed to effectuate the policies of the Act.

Affirmatively, I will recommend to the Board that Respondent should reinstitute the wage plan, including incentive pay and gain sharing plans, and the health plan as they existed preimpasse. I shall further recommend to the Board that the unit employees affected be made whole for any losses they may have sustained by virtue of Respondent's unlawful implementation of both the health plan and the wage plan. I shall therefore recommend Respondent rescind its unlawful implementations, restore the status quo ante, and make whole those employees who may have suffered by virtue of Respondents unlawful unilateral implementations. In particular, Respondent's failure to support the preimpasse health plan shall cause the employees to be made whole for any losses sustained thereby. *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Interest shall be computed pursuant *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Plainville Ready Mix Concrete Co., Batavia, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, AFL–CIO, in the below-described appropriate unit, by unilaterally implementing provisions of its wage plan and its health insurance plan offers, substantially and significantly different from its preimpasse bargaining proposals made to the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate Respondent's wage plan, including fixed wage rates, gain sharing and incentive pay plans, and its health insurance plan as they existed prior to May 1, 1989, and thereafter, upon the Union's request, bargain in good faith with the Union in the appropriate unit:

> All ready mixed drivers, yard employees, and mechanics, employed at Respondent's ready mix concrete plants located at Cincinnati, Ohio, Batavia, Ohio,, and Wilder, Kentucky, but excluding all office employees, clerical employees, sales employees, guards, plant managers, assistant plant managers and supervisors as defined in the National Labor Relations Act.

(b) Make whole all employees in the above-described appropriate unit for any loss of earnings or other economic loss they may have suffered as a result of the unlawful unilateral changes in the wage plan and health insurance plan commencing May 1, 1989, together with interest as computed as described in the remedy section of this order.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its places of business in Batavia, Ohio, Licking Pike, Kentucky, Cincinnati, Ohio, and all other places of business copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, AFL–CIO, in the below-described appropriate unit, by unilaterally implementing provisions of our wage plan and health insurance plan offers substantially and significantly different from our preimpasse bargaining proposals made to the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reinstate our wage plan, including fixed wage rates, gain sharing and incentive pay plans, and our health insurance plan as they existed prior to May 1, 1989, and thereafter, upon the Union's request, bargain in good faith with the Union in the appropriate unit:

All ready mixed drivers, yard employees, and mechanics, employed at Respondent's ready mix concrete plants located at Cincinnati, Ohio, Batavia, Ohio,, and Wilder, Kentucky, but excluding all office employees, clerical employees, sales employees, guards, plant managers, assistant plant managers and supervisors as defined in the National Labor Relations Act.

WE WILL make whole, with interest, all employees in the above-described appropriate unit for any loss of earnings or other economic loss they may have suffered as a result of the unlawful unilateral changes in our wage plan and health insurance plan commencing May 1, 1989.

PLAINVILLE READY MIX CONCRETE CO.